IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1280 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THE MEMON COOPERATIVE BANK LIMITED

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 1280 of 2004

MR ND NANAVATI FOR MR KETAN D SHAH for Petitioner

MR AD OZA PP with Mr. PR ABICHANDANI, APP for Res. No. 1

MR PM THAKKAR for Mr.RR MARSHALL for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 15/12/2004

ORAL JUDGEMENT

1. This petition is filed by the petitioner The Memon Co-operative Bank Limited, to issue of writ of certiorari or a writ of mandamus or any other appropriate writ, order or direction quashing and setting aside the order dated 4th of December, 2004 passed by the learned Additional Sessions Judge, Surat, in Criminal Revision Application No. 240 of 2004 as well as the order dated 9th of November 2004, passed by the learned Judicial Magistrate, First Class, Court No.2, Surat.

2. Present petitioner preferred a private complaint in the court of learned Judicial Magistrate, First Class, at Surat against present respondent No.2 Riaz Abdul Zunzuniya for the offences punishable under Sections 384, 406,409, 420, 201, 467, 468, 470, 477 (A) and 120-B of the Indian Penal Code. Learned Judicial Magistrate, First Class, was pleased to direct an inquiry under Section 156(3) of the Code of Criminal Procedure and hence an FIR against present respondent No.2 came to be registered at Rander Police Station of Surat District as M-Case No. 4 of 2004 for the above said offences. Respondent No.2 being Branch Manager of Surat Branch of petitioner Bank alleged to have committed above said offences. CBI investigated some offences and during that investigation, CBI received certain information in respect of Surat Branch of the petitioner Bank where respondent No.2 was serving as Branch Manager. CBI brought to the notice of the Head Office of the Bank about certain irregularity committed by the Surat Branch of the petitioner Bank. On inquiry, the petitioner Bank found prima facie financial irregularity in the functioning of respondent No.2 as Branch Manager and started investigation. At the result of the said investigation, a private complaint, as above said, came to be filed by present petitioner and on 19.6.2004, direction was issued to investigate the said complaint under Section 156(3) by learned J.M.F.C., Surat. The further details about the manner in which the offence alleged to have been committed by respondent No.2 or the progress of investigation is not required to be gone into at this stage.

3. Present respondent No.2 in the said offence came to be arrested on 26th of August, 2004 and was produced before concerned Magistrate on 27th of August, 2004. Investigating Agency though preferred application for remand of the accused to police custody, but same came to be dismissed by learned JMFC, Surat. Though against the said order of dismissal, two Revision Applications, one by the State and one by the petitioner, came to be filed before the Court of Sessions, which according to

submissions made, were dismissed by Additional Sessions Judge, Surat.

4. Present respondent No.2 on 26th of October, 2004 preferred an Application before Judicial Magistrate, First Class, 2nd Court, Surat, in the said Inquiry Case No. 43 of 2004 in M-Case No. 4/2004 praying that from the date of his remand order i.e. from 27th of August, 2004, no charge sheet till 26th of October, 2004 i.e. within 60 days, came to be filed by Investigating Agency and as per the provisions of Section 167(2)(a)(ii) respondent No.2 was entitled to default bail. On the same day, learned JMFC, vide an endorsement below the said application inquired from the office that whether charge sheet was submitted against respondent No.2. Ultimately, vide final endorsement on the said application, learned Judicial Magistrate, First Class, was informed by his office that the charge sheet was not submitted in the said offence till 9th of November, 2004. Therefore, the bail application filed, as aforesaid, was heard by learned JMFC, Court No.2, Surat, and he passed order below the said application on the same day i.e. 9th of November, 2004. Learned Judicial Magistrate, First Class, after relying on a decision of Uday Mohanlal Acharya vs. State of Gujarat, as reported in 2001 (2) GLR 1148 and a decision of this Court in the matter of Girishbhai Arunbhai Desai vs. State of Gujarat as reported in 2002 (3) Cri.L.J. 58, came to the conclusion that the provision under Section 167(2)(a)(ii) are mandatory and when the offence is alleged against the respondent No.2, were inviting the penalty of imprisonment, which may be extended upto 10 years, the investigating agency was duty bound to submit charge sheet within 60 days from the date of remanding the accused in custody and, therefore, vide order dated 9th of November, 2004, learned Judicial Magistrate, First Class, Court No.2, allowed the application of respondent No.2 for releasing him on bail by virtue of provision of Section 167(2)(a)(ii) of the Code of Criminal Procedure and respondent No.2 was ordered to be released on bail with certain conditions. The said order of learned JMFC, Court No.2, appears to have been stayed and two Revision Applications against the said order, came to be preferred by (1) Present petitioner and (2) State being Criminal Revision Applications No. 240 of 2004 and 241 of 2004. The said Criminal Revision Applications appear to have been heard together. Learned Additional Sessions Judge, Surat, after hearing the parties in said two Revision Applications and relying upon decisions on Rajeev Chaudhary v. State (NCT) of Delhi, as reported in 2001 AIR SCW 2210 and Pralhad Vithal Giri vs. State of

Maharashtra, as reported in 2002 Criminal Reported Judgments Vol. 3 page 57, came to the conclusion that from the relevant part of the aforesaid Sections, it was apparent that pending investigation relating to an offence punishable with imprisonment for a term "not less than 10 years", the Magistrate was empowered to authorize the detention of the accused in custody for not more than 90 days. For the rest of the offences, the period of detention is prescribed to be 60 days. Learned Additional Sessions Judge further observed that "not less than" would mean imprisonment should be 10 years or more and would cover only those offences for which imprisonment could be for a clear period of 10 years or more and, therefore, learned Additional Sessions Judge came to the conclusion that where in cases sentence prescribed is death sentence, life imprisonment or sentence not less than 10 years, in those cases only, the detention is authorized for 90 days, and in all other cases, the detention is for 60 days and in such 60 days, if the charge sheet is not filed, then indefeasible right is accrued in favour of an accused. Learned Additional Sessions Judge also came to the conclusion that in the present case, the accused was charged with offences punishable under Sections 409, 467 and 471 of the Indian Penal Code, which were punishable with imprisonment for life or imprisonment of either description, which may extend to 10 years. Meaning thereby, the minimum sentence having not been prescribed under Section 409 or under Section 467 or 471 of the IPC of not more than 10 years, the principle as laid down by the Hon'ble Supreme Court in the case of Rajeev Choudhary (supra) would be applicable and ultimately he dismissed both the Revision Applications. Learned Counsel Mr. Nanavati stated at this juncture that Investigating Agency at the time of producing the accused before the Magistrate on 27th of August, 2004, asked for remand, but that application came to be dismissed by learned Magistrate and petitioner as well as the State both preferred Revision Petitions before the learned Sessions Judge against the order of rejecting remand of the accused to police custody by learned Magistrate. Those Revisions were preferred on 1st of September, 2004 and was heard on 10th of September, 2004, but it was kept for the orders. According to the statement made by learned counsel for the petitioner, as per his instructions, the Revision Petitions came to be rejected by learned Additional Sessions Judge on 4.12.2004. He makes statement that the petitioner shall take further proceedings against rejecting such Revision Petitions. It is an admitted fact between the parties that charge sheet came to be filed on 18th of November, 2004. Admittedly, beyond the

period of 60 days but within the period of 90 days from the date of remanding the accused to custody.

5. Being aggrieved by the above said orders passed by learned Judicial Magistrate, First Class, Court No.2, as well as learned Additional Sessions Judge at Surat, this petition is preferred by petitioner - original complainant under Section 482 of the Code of Criminal Procedure and under Articles 226 and 227 of the Constitution of India.

6. Learned Additional Sessions Judge vide his order dated 4th of December, 2004, was pleased to stay the order of releasing the accused on bail till 13th of December, 2004 before office hours. This petition came to be filed on 8th of December, 2004 and was placed on Board by the Office on 10th of December, 2004.

7. Learned Advocate Mr. Marshall on calling out the matter submitted that learned Senior Counsel Mr. P.M. Thakker appears in the matter on behal of respondent No.2 while on behalf of the petitioner learned Senior Counsel Mr. N.D. Nanavati appears along with Mr. K.T.Shah. Having regard to the urgency of the matter and having regard to the nature of the matter, it was necessary to hear the matter finally, and accordingly learned counsels addressed this Court and the matter was heard finally. On behalf of respondent No.1 State, learned PP Mr.A.D. Oza along with learned APP Mr. P.R. Abichandani was heard. The order passed by learned Additional Sessions Judge on 4.12.2004 staying the release of the accused was extended by this Court till 14th of December, 2004 vide order dated 10th of December, 2004 and further extended till today i.e. 15th of December, 2004, vide order dated 14th of December, 2004.

8. Learned Senior Counsel Mr. Nanavati for the petitioner after giving the facts of the case stated that the question which this court is required to decide is whether, when respondent No.2 is charged for the offence punishable under Sections 409 and 471 of the Indian Penal Code, authorized detention under Section 167(2) of the Cr.P.C. would be of 90 days or of 60 days. Learned Counsel Mr. Nanavati took this court to the provisions of Section 167 of Cr.P.C. and pressed on the phraseology employed that what is to be seen is the punishment prescribed for an offence and not the punishment which a court should award to the accused on his guilt being proved, and that is clear from the scheme of Section 167 of the Cr.P.C. The simple question is required to be asked that what punishment is prescribed for certain

offences. In that context, according to learned counsel word "punishable: is employed by legislature. It was contended that at this juncture when charge sheet is to be led before the court, the question that what punishment a court should award, would be premature and irrelevant factor. Learned Counsel contended that Rajeev Chaudhary case (supra) relied upon by learned Sessions Judge is misapplication of the ratio of the decision. It was contended that the said case dealt with an offence punishable under Section 386 of the IPC where punishment prescribed is imprisonment of a term which may extend to 10 years. In the said offence of Section 386, punishment for life is not prescribed for. The offence of Section 386, therefore, according to learned counsel, is punishable with imprisonment which may extend to 10 years but not more than 10 years. In that context, the Supreme Court observed that the court could award the punishment of 10 years or less than that but not more than 10 years. Learned Counsel therefore contended that the ratio as laid down in the case of Rajeev Chaudhary (supra) would not be helpful to decide this case because admittedly the accused in this case is charged with the offences punishable under Sections 409 and 471 of the Indian Penal Code as well, and for both the offences, the punishment is prescribed for a term which may extend to 10 years or imprisonment for life. It was therefore contended that when punishment prescribed is imprisonment for life, obviously, the case would be covered under Section 167(2)(a)(i) of the Cr.P.C. where the detention is authorized for 90 days and not 60 days. It was contended that admittedly the charge sheet came to be filed by the Police within 90 days as the accused was arrested on 26.8.2004 and was remanded to the custody on 26.8.2004. Learned Counsel relied upon a decision of the Supreme Court in the matter of STATE OF MAHARASHTRA vs. BHARATI CHANDMAL VARMA, as reported in (2002) 2 SCC 121, wherein for the offences punishable under Sections 489-A, 389-B and 489-C, the Supreme Court treated the case where the charge sheet was required to be filed within 90 days. The learned Counsel stated that for the offences punishable under Sections 489-A, 489-B and 489-C of the IPC, same punishment i.e. imprisonment, which may extend upto 10 years or imprisonment for life, is provided for and for offences punishable under Sections 409 and 471 of the IPC, the same punishment is prescribed for. Learned Counsel stated that, therefore, both the courts below, misapplied the ratio laid down in Rajeev Chaudhary's case and directed to release the accused on default bail, considering the authorized detention by the Magistrate in custody of 60 days. If the orders in question are allowed to stand, would result into miscarriage of

justice in view of the clear position of law, as contended by him. Ultimately, it was urged that the petition be allowed and the orders in question be quashed under extraordinary powers of this Court.

9. Learned Counsel Mr. P.M. Thakkar raised first and foremost submission in respect of maintainability of the petition. His contention was, learned Additional Sessions Judge, decided the matter in revisional powers conferred upon him vide Section 397 of Cr.P.C. It was contended that second revision application by virtue of Section 397(3) of the Code of Criminal Procedure is barred. His contention was, when there is a statutory bar, and when express provision of law forbids further proceedings, the High Court cannot ignore such express provision of law even while exercising powers under Articles 226 and 227 of the Constitution of India or exercising inherent powers under Section 482 of the Code of Criminal Procedure. He relied upon certain decisions to fortify his contention. He relied upon a decision of the Hon'ble Supreme Court in the matter of PALLAV SHETH vs. CUSTODIAN AND OTHERS, as reported in (2001) 7 SCC 549, wherein in para-30 onwards, the Apex Court observed that limitation prescribed for taking action for contempt as per the Contempt of Courts Act, 1971, cannot be diluted while exercising inherent powers even though High Court and Supreme Court being court of record are empowered to take action by virtue of Articles 129 and 215 of the Constitution of India where no limitation for taking action for the contempt is prescribed for. Unless such provision as prescribing limitation for taking action for the contempt is not validly enacted law. The Supreme Court observed that if there by any provision of law which abrogates or stultifies the power under Articles 129 or 215, there can be little doubt that such law would not be regarded as having been validly enacted. It was contended that bar placed by Section 397(3) of Code of Criminal Procedure is validly enacted law and while exercising inherent power or powers under the Constitution, court cannot ignore and allow to maintain a second revision application.

9.1 Learned Counsel Mr. Thakkar also relied on a decision of the Apex Court in the matter of RAJAN KUMAR MACHANANDA vs. STATE OF KARNATAKA, as reported in 1990 SCC (Cri) 537 wherein the Apex Court held that where a revision petition is dismissed by the Sessions Court, a second revision would not lie to the High Court. Merely by saying that the jurisdiction of the High Court for exercise of its inherent power was being invoked the statutory bar could not have been overcome. If that was

to be permitted every revision application facing the bar of Section 397(3) of the Code would be labelled as one under Section 482.

9.2 Learned counsel relied upon a decision of Supreme Court in the matter of JITENDER KUMAR JAIN vs. STATE OF DELHI as reported (1998) 8 SCC 770 wherein the Supreme Court observed that on dismissal of revision application by court of sessions and when a petition is filed under Section 482 of the Code of Criminal Procedure, the High Court should not have dismissed merely because in such case, second revision would not lie because it was otherwise open to the High Court not to interfere in the matter when examining the case under Section 482.

9.3 Learned Counsel also relied upon a decision of the Apex Court in the matter of DEEPTI vs.AKHIL RAI as reported in (1995) 5 SCC 751, where the Supreme Court observed that the second revision was barred by virtue of Section 397 (3) of the Code of Criminal Procedure. Therefore, on the strength of the above rulings, it was contended that the petition at the first place was not maintainable.

9.4 Learned Counsel also relied upon a decision in the matter of SADHANA LODH vs. NATIONAL INSURANCE CO. LTD. as reported in (2003) 3 SCC 524, wherein with reference to the powers of High Court under Article 227 of the Constitution of India, Supreme Court observed that those powers are confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of record, much less of an error of law. It was further observed that in exercising such powers, High Court does not act as an appellate court or a tribunal and it is also not permissible to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision. Learned counsel contended that even if the decision of both the courts below are passed even in error of law, could not be corrected while exercising powers under Article 227 of the Constitution unless the subordinate court has passed order, which had no jurisdiction at all or in lack of jurisdiction. It was therefore contended that the petition styled as a petitioner under Section 482 of the Cr.P.C. or under Articles 226/227 of the Constitution of India, is not maintainable.

Coming to the merits of the matter, learned Counsel Mr. Thakkar, emphasized on a decision of Rajeev Chaudhary's case (supra) and contended that case is

covered fully by the said decision. Relying on para-6 of Rajeev Chaudhary's decision, learned counsel stated that in express term at 3 places in para-6 the Supreme Court observed that the cases covered by provision of Section 167 (2)(a)(i) are the cases where punishment of imprisonment is prescribed not less than 10 years. When punishment is prescribed for 10 years or more, the accused could be detained in custody upto a period of 90 days. He referred to the observation of the Supreme Court in para-6 wherein it is observed that in this context the expression "not less than" would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Learned counsel contended that the simple question which would arise is whether accused in this case could be punished for the imprisonment for less than 10 years? The answer, according to learned counsel, must be in affirmative. It is therefore contended that if that be so, the present case would necessarily be covered by the provisions of Section 167 (2)(a)(ii) of the Code of Criminal Procedure. Learned Counsel contended that therefore subordinate courts rightly applied the ratio of Rajeev Chaudhari case and came to the conclusion that the detention in the present case of the accused could be of 60 days and when admittedly the charge sheet was not filed within 60 days, it was indefeasible right of the accused to obtain bail. It was contended by learned Counsel that when the court has option to award punishment of imprisonment for less than 10 years, the case would obviously cover by Cl. (ii) and not by Cl. (i) and the detention would be of 60 days. The test, according to learned counsel is not what maximum punishment the court can award, but the test is according to Rajeev Choudhari's case, what minimum punishment the court can award and, therefore, in last three/four lines of para-6 in Rajeev Chaudhary's case, the Apex Court has observed that it would not cover the offence for which punishment could be imprisonment for less than 10 years. With reference to proviso (i) of Section 167 (2)(a) of the Code of Criminal Procedure, learned Counsel Mr. Thakkar also relied upon a decision of this Court in the matter of GIRISHBHAI ARUNBHAI DESAI vs. STATE OF GUJARAT, as reported in 2002 (4) GLR 3344, wherein charge sheet came to be filed against the accused under Section 304 of the Indian Penal code. Learned Counsel submitted that there are no parts of Section 304, which for the practical purposes, are referred as Part-I and Part-II. Learned Counsel submitted that when the charge sheet is submitted, it would be Section 304 of IPC and it could not be under Section 304 Part-I or 304 Part-II. Learned

Counsel submitted that in Girishbhai Arunbhai Desai's case, the Court made it clear in para 9 that the charge sheet came to be filed under Section 304 of the Indian Penal Code, for which like Sections 409 and 471 of the Indian Penal Code, punishment is prescribed to be imprisonment which may extend upto 10 years or imprisonment of life. In the said circumstances, this Court held that the charge sheet was required to be submitted within 60 days and there also reliance was placed on a decision of the Apex Court in Rajeev Chaudhari's case. Therefore, when in the said case, charge sheet was not filed within 60 days, the accused was released on bail. Learned counsel also placed reliance on a decision of Jharkhand High Court, in the matter of SUNIL KUMAR vs. STATE OF JHARKHAND, as reported in 2002 (2) Crimes, 473, wherein the subject matter before the Jharkhand High Court was Section 304-B IPC, for which the punishment is provided for the imprisonment not less than 7 years or imprisonment of life. With respect to the said offence after considering provision of Section 167(2)(a) of the Code of Criminal Procedure, the Jharkhand High Court observed in para 6 that the word "punishable" used in the section, does not mean that in all cases the convict must be punished with life sentence. Plainly and simply, it means that in suitable cases the offence is punishable with life imprisonment. One view, according to Jharkhand High Court, in respect of sentence for 304-B IPC is, the offence, is also punishable with life imprisonment and thus the offence under Section 304-B IPC, notwithstanding, the minimum sentence prescribed becomes an offence punishable with life imprisonment and punishment may extend to life imprisonment. The High Court of Jharkhand also observed that word "imprisonment of life" or "imprisonment for a term not less than 10 years" are separated by the word "or" in the aforesaid Section 167 (2)(a)(i) of the Cr.P.C. It means that either of these two conditions is required to be fulfilled for bringing an offence under its ambit. The High Court of Jharkhand also expressed third view that an offence under Section 167 (2)(a)(i) of the Cr.P.C. it cover the offences punishable with death like offence of murder or offence under Section 31-A of NDPS Act, 1985. In such offences, in the event of conviction the court has no option, but to award the sentence of death, particularly in an offence under Section 31-A of the NDPS Act, where the only sentence prescribed is of death. In para-15, the High Court of Jharkhand observed that the result of the analysis is that though the offence under Section 304-B IPC may extend to life but it cannot be an imprisonment for life as ordained for the offence under

Section 311 IPC. Though minimum punishment is prescribed is not less than 7 years but it cannot be equated with those offences for which minimum sentence of 10 years is prescribed. Thus out of three views possible, the High Court of Jharkhand adopted the third view in the circumstances of the situation and observed that it brings the offences under Section 304-B IPC out of mischief of Section 167(2)(a)(i) Cr.P.C. and, therefore, in such offences, the charge sheet is required to be led within 60 days. If no charge sheet is submitted, then, the accused has indefeasible right to have bail. Learned Counsel Mr. Thakkar has heavily relied upon the above said decision. Learned Counsel has stated that in our High Court, petitions under Section 482 of the Code of Criminal Procedure and petitions under Articles 226/227 of the Constitution of India, are separately registered, and the present application is filed to exercise all the above three powers. It is contended that it is amply clear from Rajeev Chaudhari's case that the court can award lesser sentence than the 10 years to the accused, case would cover under section 167(2)(a)(ii) of the Cr.P.C. Learned Counsel stated that if charge sheet is not filed within the prescribed period, it becomes indefeasible right of the accused to be released on bail. the learned counsel further submitted that this right flows from Article 21 of the Constitution of India and, therefore, the detention of the accused beyond 60 days in this case is unauthorised detention and that this Court should not remand this unauthorised detention for a single day. He contended that therefore the application is required to be dismissed on maintainability as well as on merits.

10. Learned PP Mr. A.D. Oza for the respondent State contended that the time limit of 60 days and 90 days is prescribed having regard to the gravity of the offence. The offence under Sections 409 and 471 of the IPC charged against the accused are grave offences and would require more days for investigation. It is clear that for the above said charges and offences, imprisonment of life is prescribed for and, therefore, the case would necessarily cover by provision of Section 167 (2)(a)(i) of the Code of Criminal Procedure and within 90 days, the charge sheet has been filed against the accused by the Investigating Agency. The question of releasing him on bail would not arise at all. About the maintainability of the petitioner, learned PP Mr.Oza relied upon two decisions of this court, namely, (i) in the matter of SHOBHANABEN H. PATEL vs. HARSHADBHAI RATILAL PATEL, as reported in 1997 (3) GLR 2329, wherein this Court observed that the powers under Article 227 of

the Constitution can be exercised in exceptional circumstances in view of bar of second revision by virtue of Section 397 (3) of the Code of Criminal Procedure. This court considered decisions of the Supreme Court in the matter of Jagir Singh vs. Ranbir Singh, as reported in AIR 1979 SC 381 and came to the conclusion that in exceptional circumstances, despite the bar under Section 397 (3) of the Code of Criminal Procedure, the Court may exercise power under Article 227 of the Constitution. Learned PP Mr. Oza also relied upon a decision of this Court in the matter of JAGADISHBHAI DHARAMSI THAKORE vs. STATE OF GUJARAT, as reported in 1997(2) GLR, 1553 wherein this Court observed that when there is miscarriage of justice or abuse of process of court etc. High Court would interfere under exercise of powers conferred by Article 226 and 227 of the Constitution of India and by Section 482 of the Code of Criminal Procedure. Learned PP Mr. Oza contended that this is mere abuse of law that when the charge sheet is led within the period of 90 days, but the court below gave compulsive bail to the accused considering the said to be 60 days. It was urged that the petition be dismissed.

11. In reply, learned Counsel Mr. Nanavati about maintainability of petition, relying upon a decision of Supreme Court of Hon'ble Three Judges Bench, in the matter of KRISHNAN vs. KRISHNAVENI, as reported in 1997 (1) Crimes 97 (SC), wherein the Supreme Court in para 10 observed that though the second revision is barred under exercise of powers given to the High Court under Sections 482 of IPC and exercising suo motu power under Section 401 of the Cr.P.C. can examine of the record and if High Court finds that there is grave miscarriage of justice or abuse of process of the courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue.

12. Learned Counsel Mr. Nanavati, in reply, also relied upon a decision in the matter of JITENDER KUMAR JAIN vs. STATE OF DELHI, as reported in (1998) 8 SCC 770, relied on by learned Counsel for respondent No.2. Learned Counsel Mr. Nanavati also relied upon a decision in the matter of PURAN vs. RAMBILAS, as reported in (2001) 6 SCC 338, wherein the Supreme Court observed that High Court's inherent jurisdiction under Section 482 remains unaffected by provisions of Section 397(3) where the order passed was an interlocutory order of the court of sessions was held immaterial. Relying on above said

decisions, it was contended that this Application under Section 482 of the Cr.P.C. as well as under Articles 226 and 227 of the Constitution of India, was clearly maintainable. In respect of a decision in the matter of Girishbhai Arunbhai Desai (supra) as cited by learned Counsel Mr. Thakkar, it was stated by learned Counsel Mr. Nanavati that in the said decision, vide para 10 of the decision, it was made clear by the Court that though the charge sheet was filed under Section 304 of the Indian Penal Code, but all other group cases were considered to be under Section 304 Part-II of the Indian Penal Code and, therefore, compulsive bail were granted by this Court in the said case. Section 304 Part-II provides punishment of imprisonment which may extend to 10 years and therefore the case of Girishbhai Arunbhai Desai will have no application whatsoever to the facts of the present case.

13. Having heard learned counsels for the parties extensively and having gone through the record of the case and decisions cited at the bar, from the above, two points arise for the determination of this matter as under :

(i) Whether the petition is maintainable despite statutory bar under Section 397(3) of the Code of Criminal Procedure, and

(ii) Whether the case is covered by the provisions of Section 167 (2)(a)(i) or Section 167 (2)(a)(ii) of the Code of Criminal Procedure in view of the accused is charged for the offences punishable under Sections 409 and 471 of the Indian Penal Code for which punishment prescribed is imprisonment for a term which may extend to 10 years or imprisonment for life.

14. Considering the first point above, it is necessary to refer to the contentions of the learned counsels again, as noted above. Learned Counsel for the respondent No.2 disputing the maintainability of the petition on the ground that firstly the petition would not be maintainable on account of express provision under Section 397(3) of the Code of Criminal Procedure. So far as, the powers under Articles 226 and 227 of the Constitution is concerned, in sum and substance, the contention was, the court cannot even correct the errors of law committed by the courts below. True it is that, where a statute by provision bars further proceedings, adjudication of the same issue under the guise of the powers vested with the High Court under Section 482 of

the Code of Criminal Procedure or under Articles 226 and 227 of the Constitution of India, must not be permitted at all. If the powers vested in the High Court under Section 482 of the Cr.P.C. are referred, it is apparent that those powers are not new powers conferred upon the High Court but the powers in the nature of savings to do something or pass some orders to prevent the abuse of law or otherwise to meet the ends of justice. True it is also that, if under the guise of extraordinary powers, proceedings are permitted to be agitated again, then the express bar provided for vide Section 397(3) of the Cr.P.C. would be frustrated. It is also necessary here to consider that putting a bar in shape of Section 397(3) of the Criminal Procedure code, the purpose is when some orders or some actions of the subordinate courts can be taken care of by the same courts themselves during any particular proceedings and there will be no use to avail the same powers again. So, once the powers under the Revision is availed of, the exercise of such powers again is barred to avoid multiplication and adjudication of an issue again and again. In this respect, it is also necessary to consider that the powers under Section 482 of the Code of Criminal Procedure refers to old dictum of law that when law affords remedy, the law also affords everything to avail such remedy. Whether a particular order of the subordinate court can be interfered with under exercise of powers under Section 482 of the Cr.P.C. or under Articles 226 of 227 of the Constitution of India is also depending upon the facts of the case. Under the guise of invoking powers under Section 482 of the Cr.P.C. or under Articles 226 or 227 of the Constitution of India, second revision must not be permitted, but at the same time, law as settled makes a concession to the extent that when any miscarriage of justice is occurred or when it is necessary in the interest of justice and to meet the ends of justice, the High Court is empowered to interfere in the orders passed by the subordinate courts. This is evident as law laid down by the decision of the Apex Court in the matter of Krishnan vs. Krishnaveni, as reported in 1997(1) Crimes 97 (SC) wherein the Hon'ble Three Judges Bench of the Apex Court was pleased to observe in paras 9 and 10 as under :

"9 The inherent power of the High Court is not one conferred by the Code but one which the High Court already has in it and which is preserved by the Code. The object of Section 397 (3) is to put a bar on simultaneous revisional applications to the High Court and the Court of Sessions so as to prevent unnecessary delay and multiplicity of proceedings. As seen, under

sub-section (3) of Section 397, revisional jurisdiction can be invoked by "any person" but the Code has not defined the word "person". However, under Section 11 of the IPC, "person" includes any Company or Association or body of persons, whether incorporated or not. The word 'person' would, therefore, include not only the natural person but also juridical person in whatever form designated and whether incorporated or not. By implication, the State stands excluded from the purview of the word 'person' for the purpose of limiting its right to avail the revisional power of the High Court under Section 397(1) of the Code for the reason that the State, being the prosecutor of the offender, is enjoined to conduct prosecution on behalf of the society and to take such remedial steps as it deems proper. The object behind criminal law is to maintain law, public order, stability as also peace and progress in the society. Generally, private complaints under Section 202 of the Code are laid in respect of non-cognizance offences or when it is found that police has failed to perform its duty under Chapter XII of the Code or to report as mistake of fact. In view of the principle laid down in the maxim Ex debito justitiae, i.e. in accordance with the requirements of justice, the prohibition under Section 397(3) on revisional power given to the High Court would not apply when the State seeks revision under Section 401. So, the State is not prohibited to avail the revisional power of the High Court under Section 397(1) read with Section 401 of the Code.

10. Ordinarily, when revision has been barred by Section 397(3) of the Code, a person accused/ complainant- cannot be allowed to take recourse to the revision to the High Court under Section 397(1) or under inherent powers of the High Court under Section 482 of the code since it may amount to circumvention of the provisions of Section 397(3) or Section 397(2) of the Code. It is seen that the High Court has suo motu power under Section 401 and continuous supervisory jurisdiction under Section 483 of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of process of the courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or

> sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue. It is therefore to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be, justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under Section 397(1) read with Section 401 of the Code. As stated earlier, it may be exercised sparingly so as to avoid needless multiplicity of procedure, unnecessary delay in trial and protraction of proceedings. The object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witnesses fades out. The recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement. These malpractices need to be curbed and public justice can be ensured only when expeditious trial is conducted."

It is well to remember that while exercising such powers under exceptional circumstances, the question of ignoring any statutory provision of law would not arise, but interference would be only to the limited extent either to prevent the abuse of process of the courts or to meet the ends of justice. In one of the decisions in the matter of SURYA DEVI RAI vs. RAMCHANDER RAI, as reported in (2003) 6 SCC 675, with reference to, of course, civil law but in similar circumstances, the Supreme Court observed that the curtailment of revisional jurisdiction of the High Court under Section 115 of the Civil Procedure Code, the powers of the High Court under Articles 226 or 227 of the Constitution, could not have taken away. Therefore, it depends upon the facts and circumstances of the case, whether the court would interfere in particular orders passed by the subordinate courts and if chooses to interfere, then it must be for the limited extent to do justice or to prevent abuse of process of law to meet the ends of justice. Therefore, in this case, maintainability of the matter is required to be examined with reference to Point No.2 above.

15. Coming to the merits of the case i.e. point No.2, as set out above, the limited question for consideration is when in a penal provision, phraseology is used "imprisonment which may extend 10 years or imprisonment of life" whether the case would cover by

provisions of Section 167(2)(a)(i) or within the provision of Section 167 (2)(a)(ii). As contended by the petitioner as well as by the State when offence invites imprisonment for life, the authorized detention must be of 90 days and not of 60 days. From the side of respondent No.2, the stress is of the case of Rajeev Chaudhary (supra).

16. I do not consider it necessary to reproduce Section 167 of the Criminal Procedure Code, but it is necessary to ponder over the phraseology employed by the Legislatures in Section 167 (2)(a)(i). The period of detention is authorized for 90 days where the investigation relates to the offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years. If word "punishable" is considered with rest of the sentences employed in (i) necessitates consideration whether the word "punishable" used with reference to the punishment which a court could award to an accused or punishment which is prescribed by penal statute. Undoubtedly, at the stage of Section 167, the question that what punishment the Magistrate could award would be out of consideration, which will be considered only when the trial is over and the accused is found guilty. Therefore, the term used by the Legislature "punishable" in this respect must be understood to be punishment prescribed in any penal statute. So, for deciding whether the case would fall within the category (i) or (ii), what is required to be seen is the punishment prescribed by respective penal statute. In this case, along with other charges accused is also charged with the offence punishable under Sections 409 and 471 of the Indian Penal Code and the punishment prescribed for both the offences is "imprisonment for a term which may extend to 10 years or imprisonment for life". Though the option is given to the court either to award punishment from one day to 10 years or imprisonment for life. Meaning thereby that if court comes to the conclusion that where punishment upto 10 years would not be sufficient, court is empowered to award punishment for life. This is the punishment prescribed by the statute. The discretion of the Court is still restricted to the extent that either the court would choose to inflict any imprisonment upto 10 years and that is not sufficient, then only option i.e. second option for inflicting punishment is imprisonment of life. True that in first option, that is to say, if the court selects first option for inflicting punishment, then it must not be more than 10 years, but if the court selects more rigorous punishment, then the second option also can be exercised by the court to inflict imprisonment of

life. The court is not empowered to punish an accused for the imprisonment of 11 years or 12 years or 13 years. There are only two categories, in which the guilt of the accused can be dealt with while inflicting punishments. Except Sections 409 and 471 of the Indian Penal Code, in some other offences also, same punishment is prescribed by Indian Penal code. In my humble view, this is so, because by nature offences falling within Sections 409 and 471 of the IPC, may be of smallest magnitude to the greatest extent, there may be misappropriation of one rupee and there may be misappropriation of millions and billions of rupees. There may be forgery having smallest implications, there may be forgery having devastating implications. Thus, the nature of offences are such that while keeping in mind principle of punishment commensurating to guilt, penal provisions are made. At the same time, it must be borne in mind that the period of 60 days and 90 days as prescribed by Section 167(2)(a)(i) and (ii) of the Cr.P.C. are provided for having regard to the gravity of the offence. When the offence is grave, investigating agency is likely to take time in investigating the offence. Therefore, for the graver offence for which graver punishment is prescribed, the detention is authorized upto 90 days and that period is allowed to the investigating agency to investigate the offence. In lesser offence therefore the period of 60 days are provided where the punishment prescribed is lesser than 10 years. In such case, no more time than 60 days is granted by statutory provisions to the investigating agency.

17. Thus, as discussed above, when punishment is prescribed by a penal statute, according to the nature of the offence, the offence under Sections 409 and 471 of the Cr.P.C. on proving guilt, may visit imprisonment for life for the accused. This is so because the nature of offence is such and this is in my humble view the only reason for which the courts are conferred with options like either imprisonment which may extend to 10 years or imprisonment for life. Therefore, when a statutory period is prescribed by Section 167 for completing the investigation having regard to the punishment prescribed for particular offence, court cannot ignore the punishment prescribed. For Section 409 and 471 of the Cr.P.C., punishment for life imprisonment is also prescribed, which the court can inflict in appropriate case and which can be decided only after the trial is over and accused is found guilty. For the purpose of period of completion of investigation, in view of above, the relevant consideration would be punishment prescribed by penal statute and not the punishment which could be

awarded by a court on accused being found guilty. In this perspective, it is necessary to take into consideration observation made by the Apex Court in para-6 of Rajeev Chaudhary (supra) case. It must be borne in mind that the Apex Court was concerned with the offence under Section 386 of IPC where punishment prescribed is "imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine". When the question arose before the Supreme Court that whether when a court is empowered to inflict punishment of 10 years within the phraseology used in Section 386 of IPC, the same would amount to punishment "a term not less than 10 years" as used in Section 167 (2)(a)(i) of the Code of Criminal Procedure. In this respect, the Apex Court in para 6 of Rajeev Chaudhary's case observed that under Section 386 punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less and, therefore, the Apex Court held that the case was not covered by Section 167(2)(a)(i) of the Code of Criminal Procedure. The present case is not a case wherein court is not empowered to inflict punishment for more than 10 years but if court while inflicting punishment for Sections 409 or 471, chooses option to inflict more punishment, then it should be imprisonment for life. In this view of the matter, when punishment is prescribed for Sections 409 and 471 of IPC, may also invite infliction of punishment of imprisonment of life, the present facts of the case would not be governed by the ratio as laid down by the Apex Court in Rajeev Chaudhary's case (supra). Merely because the option is given to the court to select one of the punishments prescribed for the offence would not mean that the court while dealing with such offences is also empowered to inflict punishment for lesser period than 10 years, the case would govern by Cl. (ii) where the period for the completion of investigation is prescribed to be of 60 days. This important aspect has not been considered by the learned JMFC or learned Additional Sessions Judge. In respect of a decision in Girishbhai Arunbhai Desai (supra) it is true that the charge sheet was submitted for the offence punishable under Section 304 of the Penal Code. Thereafter, vide para 10, it appears that in all other group cases, the charge sheet was considered to be filed under Part-II of Section 304 and taking that fact into consideration, this court came to the conclusion that the case was covered by the provision of Section 167 (2)(a)(ii) of the Code of Criminal Procedure and the accused was entitled to bail.

18. I may respectfully disagree with the ratio as laid down by the Hon'ble Jharkhand High Court in the matter of Sunil Kumar vs. State of Jharkhand (supra). In my humble view when punishment is prescribed for the imprisonment of life, may be in option, the case would govern by provisions of Section 167 (2) (a)(i) of the Code of Criminal Procedure and in my humble opinion, no other view is possible than the view as discussed above.

19. Learned Judicial Magistrate, First Class, Surat, as well as learned Additional Sessions Judge, both did not take the fact into consideration that the period of completion of investigation as per the provisions of Section 167 of the Cr.P.C. is depending upon the punishment prescribed by the penal statute. For both the offences under Sections 409 and 471 of IPC, imprisonment of life is provided for by way of punishment. The orders in question therefore passed by learned JMFC, Court No.2, Surat and learned Additional Sessions Judge, Surat, cannot be allowed to stand to perpetuate miscarriage of justice. True it is that, very purpose of prescribing limit for the completion of investigation directly flows from Article 21 of the Constitution of India with respect to liberty of citizen. Liberty of citizen and law and order is perennial problem of State craft and, therefore, there are provisions in law in shape of Section 167 etc. Right of a citizen under Article 21 of the Constitution of India cannot be denied, but by such provisions it is regulated which also by express provision authorizes State to investigate the offences and thereby to some extent right of liberty of a citizen is curtailed. Undoubtedly, when on one side, with liberty of a citizen is situated and when right of State under statutory provision is pitted against right of the citizen, a careful consideration is required. On careful scrutiny, it appears that the period in this case for the completion of investigation would be of 90 days. In this case, before completing this 90 days, charge sheet is filed. Though on 18.11.2004, but when the application filed by the accused before learned JMFC, the period of 90 days was not over and the charge sheet came to be filed by the Investigating Agency before the period of 90 days is over. Therefore, no indefeasible right in favour of the accused is accrued to release him on bail.

20. In the above view of the matter, this petition is maintainable to the extent that interference of this court is required in the orders complained of for the above reasons.

21. In the result, this Application is allowed. The

order passed by learned Judicial Magistrate, First Class, Court No.2, Surat, in Inquiry Case No. 43 of 2004 on 9th of November 2004 in Rander Police Station M-Case No. 4 of 2004 and order passed by learned Additional Sessions Judge, Surat, on 4th of December, 2004 in Criminal Revision Application No. 240 of 2004 and Criminal Revision Application No. 241 of 2004 are hereby quashed. Session Court/concerned Additional Sessions Court, Surat, is directed to see that bail application of the accused is decided on merits without being influenced by the order passed by this Court today and in accordance with law.

(J.R. Vora, J.)

p.n.nair